Tentative Rulings for July 19, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

16CECG01846 ***MUFG Union Bank, N.A. v. Mahal*** **(Dept. 402)**

12CECG03881 ***Obaid v. Ayala Inc. et al.*** **(Dept. 403)**

11CECG04226 ***East v. Comprehensive Educational Services*** **(Dept. 402)**

16CECG00866 ***California Department of Motor Vehicles v. Grewal (Dept. 402)***

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

15CECG03720 ***Kyle Porter v. Community Regional Medical Ctr*** **(Dept. 503) [Hearing continued to August 3, 2016 in Dept. 503]**

16CECG00949 ***Bradshaw v. Acqua Concepts, Inc., et al.*** **– Motion for Bond is continued to Tuesday, July 26, 2016, at 3:30 p.m. in Dept. 503. Demurrer and Motion to Strike are continued to Tuesday, August 9, 2016 at 3:30 p.m. in Dept. 503.**

12CECG01068 ***Karima Ali v. Asurea Insurance Services*** **is continued to Wednesday, July 20, 2016 at 3:30 p.m. in Dept. 402.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

2 **Tentative Ruling**

Re: ***Serquina et al. v. Mata***
Superior Court Case No. 15CECG02765

Hearing Date: July 19, 2016 (Dept. 402)

Motion: Motion to compel plaintiff to provide initial verified responses to form interrogatories, set one, special interrogatories, set one, request for production of documents, set one and sanctions

Tentative Ruling:

To grant the defendant Melissa Ann Mata's motion to compel plaintiff Cecilia Gonzalez to provide initial verified responses to form interrogatories, set one, special interrogatories, set one and request for production of documents, set one. Code of Civil Procedure sections 2030.290(b), 2031.300(b).) Plaintiff Cecilia Gonzalez to provide complete verified responses to all discovery set out above, without objection within 10 days after service of this order.

To grant defendant Melissa Ann Mata's motion for sanctions. Cecilia Gonzalez is ordered to pay monetary sanctions to the law offices of Wilkins, Drolshagen and Czeshinski in the amount of $465 within 30 days after service of this order. CCP §§2030.290(c), 2031.300(c).

The clerk is ordered to correct the address in the court records for Cecilia Gonzalez from Copler Avenue to Poplar Avenue.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 07/18/16.
(Judge's initials) (Date

03 **Tentative Ruling**

Re: ***Clausell v. Lopopolo***
Case No. 15 CE CG 02496

Hearing Date: July 19th, 2016 (Dept. 402)

Motion: Defendant Lopopolo's Demurrer to First Amended Complaint

Tentative Ruling:

To sustain the demurrer to the second, fourth and fifth causes of action in the first amended complaint, with leave to amend, for failure to state facts sufficient to constitute a cause of action. (Code Civ. Proc. § 430.10, subd. (e).) Plaintiff shall serve and file her second amended complaint within ten days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

Demurrer to Second Cause of Action: Plaintiff's second cause of action attempts to state a claim for medical battery against Dr. Lopopolo based on the alleged fact that, although plaintiff consented to the laparoscopic hysterectomy that was performed, she did not consent to have another doctor perform the surgery. However, plaintiff never alleges that the surgery that was performed on her was substantially different than the surgery to which she consented.

"Where a doctor obtains consent of the patient to perform one type of treatment and subsequently performs a substantially different treatment for which consent was not obtained, there is a clear case of battery." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 239, internal citations omitted.) However, "[t]he battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented. When the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present. However, when the patient consents to certain treatment and the doctor performs that treatment but an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent given appears; rather, the doctor in obtaining consent may have failed to meet his due care duty to disclose pertinent information. In that situation the action should be pleaded in negligence." (*Id*. at pp. 240-241.)

In the present case, plaintiff alleges in her first amended complaint that she consented to a laparoscopic hysterectomy to be specifically performed by Dr. Lopopolo, and that the procedure was expected to be complicated. (FAC, ¶ 16.) She then alleges that, after she was sedated and unconscious, Dr. Lopopolo allowed an "authorized [*sic*, unauthorized], unqualified, substitute second physician, Defendant, JAMES B. ROTH D.O. to perform extremely dangerous portions of the surgical procedure without Plaintiff's knowledge or consent." (*Id*. at ¶ 17.) "JAMES B. ROTH, D.O. was not a

resident doctor and in fact, is an independent osteopathic physician who was not affiliated with CHRISTINE LOPOPOLO M.D.'s practice." (*Id*. at ¶ 18.) She also alleges that she had never met Dr. Roth before the hysterectomy, that she never consented to have him perform the dangerous portions of the hysterectomy, and that she was not advised by Dr. Lopopolo that he was going to substitute into the surgery to perform dangerous portions of the surgery. (*Id*. at ¶ 19.) The first time she heard of Dr. Roth was after the botched surgery. (*Ibid*.) She was harmed as a result of Dr. Lopopolo substituting in Dr. Roth to perform portions of the surgery. (*Id*. at ¶ 20.)

However, none of these allegations show that plaintiff did not consent to the surgery that was performed, or that the procedure that was performed on her was substantially different than the one to which she consented. (*Cobbs*, *supra*, 8 Cal.3d at pp. 239-241.) In fact, plaintiff alleges that she consented to the same surgical procedure that was performed on her. (FAC, ¶¶ 16-17.) While she alleges that she only consented to have Dr. Lopopolo perform the procedure, not Dr. Roth, this allegation does not state that the procedure itself was fundamentally different from the one to which she consented. Indeed, the allegations of the FAC show that plaintiff received the procedure that she believed she was going to have, albeit with "dangerous portions" of the procedure performed by another doctor. These allegations are not enough to support a claim for medical battery, since there are no facts pled to show that plaintiff did not consent to the type of procedure that was actually performed. At most, the allegations support a claim for medical malpractice based on the occurrence of a complication during a surgery to which plaintiff consented. (*Cobbs*, *supra*, at 241.)

Plaintiff does allege that Dr. Roth was "unqualified" and "unauthorized" to perform the procedure, but she does not allege any facts to support these conclusions. Arguably, plaintiff might be able to state a battery claim if Dr. Roth had no training or qualifications to allow him to perform the kind of surgery at issue here. However, plaintiff never alleges that Dr. Roth was not a licensed doctor, or that he had no training or background that qualified him to perform a laparoscopic hysterectomy. Indeed, she admits that he was a doctor of osteopathy, which implies that he was licensed and qualified to perform medical procedures. Therefore, the plaintiff's conclusory allegations that Dr. Roth was "unqualified" or "unauthorized" do not show that his participation in the surgery somehow changed the fundamental nature of the procedure and went beyond the scope of her consent.

Defendant also contends that plaintiff consented to the procedure, including the possible presence of other doctors and healthcare professionals who might participate in the procedure, and that common knowledge tells us that more than one person is needed for the type of procedure that plaintiff underwent. However, defendant improperly relies on extrinsic facts, namely plaintiff's responses to requests for admissions and "common knowledge" regarding surgical procedures, to support her contentions on demurrer. "A demurrer tests the pleadings alone and not the evidence or other extrinsic matters. Therefore, it lies only where the defects appear on the face of the pleading or are judicially noticed (Code Civ. Proc., §§ 430.30, 430.70)." (*SKF Farms v. Superior Court* (1984) 153 Cal.App.3d 902, 905.)

Here, defendant's assertions about the contents of plaintiff's informed consent do not appear in the FAC, although she does admit that she consented to the procedure. (FAC, ¶ 16.) Nor is there a copy of the informed consent attached and incorporated into the FAC. While defendant requests that the court take judicial notice of the consent forms and plaintiff's responses to the requests for admissions, the court declines to take judicial notice of these facts, as the contents of discovery responses are not judicially noticeable facts. (*Fremont Indemnity Co. v. Fremont Gen. Crop*. (2007) 148 Cal.App.4th 97, 113-115: court may take judicial notice of court orders and judgments in its files, but not of the truth of the contents or the proper interpretation of other documents in its files.) Therefore, the court will not base its ruling on the alleged fact that plaintiff consented to have other people participate in the surgery, as this "fact" is not properly before the court on demurrer. The meaning and validity of the consent forms may be resolved on summary judgment or at trial, but not on demurrer. (*Fremont, supra*, at 114-115.)

Likewise, there is nothing in the complaint that would support defendant's claim that it is "common knowledge" that surgeries like the one at issue here require several doctors and healthcare professionals to perform. Defendant does not even cite to any judicially noticeable documents or attach any evidence to show that it is common practice to have more than one doctor participate in a hysterectomy surgery. The assertions of counsel in the points and authorities brief are not evidence and cannot be considered by the court in ruling on the demurrer. (*Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881.) Even if defendant did present some evidence to support her assertions, the court could not consider such evidence on demurrer.

While the defendant may request judicial notice of facts that are indisputably true or constitute common knowledge (Evid. Code § 452, subd. (g), the number of doctors and medical professionals needed to perform a laparoscopic hysterectomy does not appear to be a fact that is a matter of common knowledge. Indeed, this is a matter that would require expert testimony to establish. Therefore, the court will not consider the extrinsic matters that defendant has submitted in support of her demurrer.

Nevertheless, since plaintiff has failed to allege that she was subjected to a substantially different surgical procedure than the one to which she consented, she has not stated a valid claim for medical battery. Therefore, the court intends to sustain the demurrer to the second cause of action for failure to state facts sufficient to constitute a cause of action, with leave to amend.

Demurrer to Fourth Cause of Action: "A complaint for fraud must allege the following elements: (1) a knowingly false representation by the defendant; (2) an intent to deceive or induce reliance; (3) justifiable reliance by the plaintiff; and (4) resulting damages. Every element must be specifically pleaded." (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1816, internal citations omitted.)

Here, plaintiff attempts to state a claim for fraud based on Dr. Lopopolo's failure to inform her that she was going to have Dr. Roth perform part of the surgery. (FAC, ¶ 28.) She claims that Dr. Lopopolo intended to allow a different doctor to attend the surgery, perform dangerous portions of the surgery, and "practice his skills" on plaintiff.

(*Ibid*.) Plaintiff claims that this is known as "Ghost Surgery." (*Ibid*.) Dr. Lopopolo failed to advise plaintiff that she would be allowing a substitute physician to perform dangerous parts of the surgery and plaintiff had no reason to believe that any other physician besides Dr. Lopopolo would be performing parts of the surgery. (*Ibid*.) Thus, she relied on Dr. Lopopolo's representations. (*Ibid*.) If she had known that Dr. Lopopolo intended to substitute Dr. Roth to perform dangerous portions of the surgery, she would never have consented to having the hysterectomy. (*Id*. at ¶ 29.) As a result of this fraud, plaintiff was harmed when the "Ghost Surgery" was performed. (*Id*. at ¶ 30.)

However, plaintiff's FAC fails to plead any facts showing that Dr. Lopopolo intended to deceive her when she failed to inform her of the plan to substitute a doctor to perform part of the surgery. At most, she alleges that Dr. Lopopolo knew she was going to have another doctor participate and perform portions of the procedure, and that she failed to inform plaintiff of this fact. There are no facts indicating any intent to deceive on the part of Dr. Lopopolo.

In addition, plaintiff alleges no facts showing that she was actually damaged by Dr. Lopopolo's failure to tell her of the plan to use another doctor during the procedure. Plaintiff does allege in conclusory fashion that she was damaged by the "Ghost Surgery", but she never alleges that it was Dr. Roth who caused her damages. (FAC, ¶ 30.) Earlier in the complaint, she alleges that Dr. Roth "performed the procedure on Plaintiff which resulted in an obliterated ureter" (FAC, ¶ 24), and this allegation is incorporated into the fraud claim. However, it is unclear from this allegation whether Dr. Roth was the doctor who actually caused the damage to her ureter, or whether he simply participated in the surgery and it was Dr. Lopopolo or some other person who caused the damage. Since both doctors apparently participated in the procedure, either or both doctors could have caused the harm to plaintiff. Without some specific facts showing that plaintiff was actually harmed by the failure to inform her of Dr. Roth's participation, plaintiff has failed to allege a valid fraud claim. Therefore, the court intends to sustain the demurrer to the fourth cause of action for fraud, with leave to amend.

Demurrer to Fifth Cause of Action: "A cause of action for intentional infliction of emotional distress exists when there is ' " ' "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." ' " ' A defendant's conduct is 'outrageous' when it is so ' " 'extreme as to exceed all bounds of that usually tolerated in a civilized community.' " ' And the defendant's conduct must be ' " 'intended to inflict injury or engaged in with the realization that injury will result.' " ' " (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051, internal citations omitted.)

Here, plaintiff alleges that Dr. Lopopolo's "conduct of secretly substituting in an unauthorized, unqualified physician after plaintiff was sedated was outrageous", and that Dr. Lopopolo acted "with reckless disregard of the probability that [plaintiff] would suffer severe emotional distress." (FAC, ¶¶ 32, 33.) She also alleges that she suffered

severe emotional distress as a result of defendant's secret decision to allow Dr. Roth to perform a dangerous portion of the surgery. (*Id*. at ¶ 34.)

However, plaintiff's allegations do not show the type of extreme or outrageous conduct that would support a claim for intentional infliction of emotional distress. While plaintiff alleges that Dr. Lopopolo failed to tell her that she intended to have Dr. Roth participate in the surgery, this conduct is not, on its face, so extreme or outrageous as to exceed all bounds of what is usually tolerated in a civilized community. (*Hughes*, *supra*, at pp. 1050-1051.) At most, Dr. Lopopolo allowed another licensed doctor to perform a dangerous part of the surgery without telling plaintiff about her plans. There are no facts alleged in the complaint that would indicate that Dr. Lopopolo's conduct was anything more than negligent, much less extreme and outrageous.

Nor does plaintiff allege any facts showing that Dr. Lopopolo intended plaintiff to suffer severe emotional distress when she made the decision to have Dr. Roth perform part of the surgery without informing plaintiff of her plans. She does allege that Dr. Lopopolo allowed Dr. Roth to participate with reckless disregard of the probability that plaintiff would suffer emotional distress (FAC, ¶ 33), but there are no facts indicating that Dr. Lopopolo was aware that Dr. Roth's participation was likely to cause plaintiff emotional distress.

It seems that plaintiff may be alleging that Dr. Lopopolo must have been aware that Dr. Roth's participation would cause her emotional distress because he was "unqualified and unauthorized" to perform the surgery. Again, however, plaintiff alleges no facts showing that Dr. Roth was not qualified to participate in the surgery and perform dangerous portions of the operation. Plaintiff admits that Dr. Roth is a licensed doctor of osteopathy (FAC ¶ 18), which implies that he is qualified to participate in medical procedures.

Plaintiff seems to suggest in her opposition that Dr. Roth was not qualified because he was not an OB-GYN, and that only an OB-GYN could be qualified to perform the surgery in question. However, this allegation does not appear in the complaint, nor does plaintiff provide any factual basis for the implied claim that only an OB-GYN could perform the surgery properly. Thus, plaintiff has not alleged any facts in her FAC that would tend to support her conclusory claim that Dr. Lopopolo acted recklessly in allowing Dr. Roth to operate on plaintiff, much less that she intended to cause her emotional distress. Therefore, the court intends to sustain the demurrer to the fifth cause of action for failure to state facts sufficient to state a cause of action, with leave to amend.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 07/18/16.

(Judge's initials) (Date)

Tentative Rulings for Department 403

(5)

Tentative Ruling

Re: ***Rodela et al. v. Hatayama et al.***
Superior Court Case No. 15 CECG 01551

Hearing Date: July 19, 2016 **(Dept. 403)**

Motion: By Plaintiffs to tax costs

Tentative Ruling:

To grant the motion and to tax the entire Memorandum of Costs.

Explanation:

Background

On May 14, 2015, Plaintiffs filed a complaint against Defendants Rodney Hatayama, D.V.M., Patti Hatayama, South County Veterinary Hospital, a business entity of unknown form; and Sierra Human Resources, LLC. The latter's correct name is Sierra HR Partners, Inc.

The complaint alleged seven causes of action for harassment in violation of FEHA (race, color, national origin, religious belief, sex and/or gender, sexual orientation); harassment in violation of FEHA (pregnancy); failure to prevent harassment in violation of FEHA; retaliation in violation of FEHA; retaliation in violation of Labor Code § 6310; defamation and failure to provide rest breaks (Labor Code § 226.7). Only the **first** and **third** causes of action were alleged against Defendant Sierra HR Partners, Inc.

The Veterinary Defendants filed a demurrer, which was overruled. Defendant Sierra HR Partners, Inc. filed a separate demurrer. It was sustained with leave to amend. In its ruling, the Court suggested that the third cause of action could possibly be pleaded as a breach of contract brought by a third party beneficiary.

A First Amended Complaint was filed. Defendant Sierra HR Partners, Inc. was no longer named as a Defendant vis-à-vis the first and third causes of action. Instead, the Plaintiffs added an eighth cause of action for breach of contract against Sierra. Sierra again filed a demurrer.

On April 8, 2016, the Court sustained the general demurrer for failure to state sufficient facts and the special demurrer for uncertainty with leave to amend. The Court stated:

> The cause of action for breach of written contract does not attach the contract nor plead *in haec verba*. See ¶ 261. This is required. See *Sweet*

v. *Vista Irr. Dist., supra*. The entire cause of action consists of legal conclusions. See ¶¶ 257-277. Unless the contract authorized the demurring Defendant to intervene in FEHA matters on behalf of the employees of its client, this cause of action appears non-existent. The general demurrer and the special demurrer will be sustained with leave to amend. [Note: The fact that the demurring party will not produce the contract in discovery is not a matter to be addressed in opposition to a demurrer.]

Rather than amending the eighth cause of action, on April 28, 2016, the Plaintiffs filed a dismissal of Defendant Sierra HR Partners, Inc. with prejudice.

On May 4, 2016, this Defendant filed a Memorandum of Costs consisting of the filing fee ($435) and the motion fee for the demurrer to the First Amended Complaint ($60). On May 24, 2016, Plaintiffs filed a motion to tax costs. Opposition and a reply were filed.

Arguments

Plaintiffs submit that this is a FEHA action. They point out that the original complaint alleged both a cause of action for harassment in violation of FEHA and cause of action for failure to prevent harassment in violation of FEHA against Defendant Sierra Human Resources, LLC. As a result of their position, Plaintiffs submit that in FEHA actions, a court, "in its discretion may award" costs, including expert witness fees to the "prevailing party." [Gov.C. § 12965(b)] Section 12965(b) is an **express exception** to CCP 1032(b) in that it provides for a discretionary, rather than a mandatory, award of costs in the situations it covers. [*Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 105]

Notably, a prevailing *defendant* in an FEHA action "should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so." [*Williams v. Chino Valley Independent Fire Dist.*, supra, 61 Cal.4th at 115 at 840 (applying standard in *Christiansburg Garment Co. v. EEOC* (1978) 434 US 412 at 421-422, 98 S.Ct. at 700-701); *Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1057]

In opposition, the Defendant submits that at the time the dismissal was filed, only a cause of action for breach of contract was brought against it. This is correct. See Request for Dismissal filed on April 28, 2016.

Merits

California applies the "primary rights" theory of pleading under which a "cause of action" is comprised of the "primary right" of the plaintiff, a corresponding duty of the defendant, and the defendant's wrongful act constituting a breach of that duty. [*Crowley v. Katleman* (1994) 8 Cal. 4th 666, 681–682] See also *4 Witkin, Cal Proc* (5th Ed 2008), Pleading § 34. The invasion of **one** primary right gives rise to a **single** cause of action. [*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.*, (1993) 5 Cal. 4th

854, 860] The manner in which a plaintiff chooses to set forth his or her claims within the body of the complaint is irrelevant to determining the number of causes of action alleged under the primary rights theory. [*Hindin v. Rust* (2004) 118 Cal. App. 4th 1247, 1257] The "cause of action" is based on the harm suffered, as opposed to the *particular theory* asserted by the litigant. [*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.*, supra.]

But, it is very common for attorneys to use the phrase "cause of action" to refer to a group of related paragraphs in a complaint reflecting a separate theory of liability. [*Hayter Trucking, Inc. v. Shell Western E&P, Inc*. (5th Dist.1993) 18 Cal. App. 4th 1, 12] But, even if a complaint seeks recovery for the same personal injury under several different legal theories, there is still only a single cause of action. Each distinct legal theory (e.g., negligence, breach of implied warranty and strict liability) constitutes a separate "count" based on the same primary right. [*Barrett v. Superior Court* (1990) 222 Cal. App. 3d 1176, 1182 fn.1; see also *Slater v. Blackwood* (1975) 15 Cal. 3d 791, 795–796]

In the case at bench, all Plaintiffs were seeking redress for injuries sustained as a result of the Veterinary Defendants alleged violations of FEHA. This was the primary right asserted by all Plaintiffs. See *Crowley v. Katleman,* supra. As for Defendant Sierra, Plaintiffs believed that it had a duty to prevent the alleged FEHA violations and enforce its precepts. See the first and third causes of action of the original complaint and the eighth cause of action of the First Amended Complaint. Accordingly, the action at bench is a FEHA action as to all Defendants. The eighth cause of action for breach of contract is simply a legal theory of recovery for the invasion of the primary right. See *Barrett v. Superior Court*, supra.

As stated supra, a prevailing *defendant* in an FEHA action "should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so." [*Williams v. Chino Valley Independent Fire Dist.*, supra, 61 Cal.4th at 115 at 840 (applying standard in *Christiansburg Garment Co. v. EEOC* (1978) 434 US 412 at 421-422, 98 S.Ct. at 700-701); *Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1057]

Here, Sierra HR Partners has not shown that the action was "objectively without foundation" when filed. It has not shown that the Plaintiffs continued to maintain the action after the liability of Sierra became dubious. In fact, when the Court advised that the contract had to authorize Sierra to intervene in FEHA matters on behalf of the employees of its client in order to state a valid cause of action for breach of contract, the Plaintiffs voluntarily dismissed this Defendant. Therefore, the motion to tax will be granted.

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 07/18/16.

(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Gill, et al. v. Trinity Health, St. Agnes Center, et al.***

Case No. 15CECG01916

Hearing Date: July 19, 2016 (Dept. 403)

Motion: By Defendants St. Agnes Medical Center, Victor Lynn Perry M.D., Laura Tellez R.N., J'Na Carter R.N. and Tristan Jost to compel responses to written discovery and for sanctions.

Tentative Ruling:

To grant the motion to compel. Plaintiffs shall provide verified, written responses within 20 days of this order.

To award sanctions in the amount of $840.00. Sanctions to be paid within 30 days of this order.

Explanation:

As of the date of the posting of this order, the Court has not received either an opposition or a reply brief.

Interrogatories and Requests for Production

When a party has not responded to Interrogatories all a moving party need show is that a set of interrogatories was properly served on the opposing party, that the time to respond has expired, and that no response of any kind has been served. (Cf. *Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 905-06; CRC 3.1345 (no need for separate statement or meet and confer).

Here, the moving party has presented evidence to show that the interrogatories were properly served and that no responses have been served.

Likewise, when a party has not responded to Requests for Production, a responding party waived all objections, including privilege and work product. (CCP §2031.300.) There is no timeline on the motion and no need for a meet and confer. (CCP §2031.300.)

Here the moving parties have presented evidence to show that the Requests for Production were properly served and that no responses were ever received.

Therefore, the motion to compel responses to the Form Interrogatories, Special Interrogatories and Request for Production is granted.

Sanctions

The court "shall" impose a monetary sanction against the party opposing the motion to compel unless it finds that party acted "with substantial justification" or other circumstances render the sanction "unjust." (Code of Civ. Proc. §2030.290, subd.(c) (interrogatories); §2031.300, subd.(c)(requests for production).)

Defendants seek monetary sanctions in the amount of $840.00 for bringing this motion. The 4 hours spent on the motion at a rate of $210 per hour seems reasonable. Defendants do not seek costs of the motion.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 07/18/16.

(Judge's initials) (Date)

Tentative Rulings for Department 501

(5)

Tentative Ruling

Re: ***Dulley v. Fisher et al.***
Superior Court Case No. 15 CECG 02263

Hearing Date: July 19, 2016 **(Dept. 501)**

Motions: (1) Demurrer by Defendants Score Sports Café and Lounge and Michael Anthony Lopez; and
(2) Motion to strike by Defendants Score Sports Café and Lounge and Michael Anthony Lopez

Tentative Ruling:

To sustain the general demurrer to the third cause of action without leave to amend. To grant the motion to strike without leave to amend. An Answer to the remainder of the Second Amended Complaint is to be filed within 10 days of notice to the ruling. Notice runs from the date that the Clerk serves the Minute Order plus 5 days for service by mail. See CCP § 1013(a).

Explanation:

Background

Plaintiff is self-represented. On July 17, 2015, he filed a complaint naming as Defendants Sarah Rochelle Fisher aka Sarah Rochelle Bane, Score Sports Café and Lounge, Michael Anthony Lopez, Hardaway Security, Jarrell Cotton and Donavan Buelly. The complaint appears to stem from an altercation that took place at Score Sports Lounge on July 17, 2013 between Plaintiff and Defendant Fisher. The incident appears to have resulted in the arrest of the Plaintiff.

The initial complaint consisted of a long narrative of events beginning at page 3 ¶ 3.1 of the Complaint and ending on page 18. Then, Plaintiff listed 13 causes of action on page 14 after the narrative. As a result, the complaint did not conform to the requirements of California Rules of Court Rule 2.112; each cause of action must be separately identified, separately stated and list the names of the Defendants against whom each is stated. In addition, many of the causes of action listed on page 14 were not civil "causes of action"; they were legal doctrines; e.g. destruction of evidence, evidence tampering, withholding evidence, obstruction of justice. Others were non-existent; e.g., intentional negligence and false police report.

Finally, the complaint did not contain "a statement of the *facts* constituting the *cause of action,* in ordinary and **concise** language." [CCP § 425.10] The "facts" to be

pleaded are those upon which liability depends—i.e., "the facts constituting the cause of action." These are commonly referred to as "ultimate facts." [See *Doe v. City of Los Angeles* (2007)42 Cal.4th 531 at 550] "A complaint must allege the ultimate facts necessary to the statement of an actionable claim. It is both improper and insufficient for a plaintiff to simply plead the *evidence* by which he hopes to prove such ultimate facts." [*Careau & Co. v. Security Pac. Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390 (emphasis in original)]

As a result, on February 3, 2016, the Court sustained the special demurrer for uncertainty brought by Defendant Score Sports Café and Lounge and Michael Anthony Lopez with leave to amend. A First Amended Complaint was filed on February 22, 2016. On March 30, 2016, Defendants Score and Lopez filed a general demurrer for failure to state sufficient facts and a special demurrer for uncertainty to the third, fourth and fifth causes of action. In the end, the parties stipulated to the filing of a Second Amended Complaint and a withdrawal of the demurrer to the First Amended Complaint. See Supplemental Declaration of Peel filed on May 4, 2016 and Plaintiff's Supplemental Declaration filed on May 17, 2016.

On May 17, 2016, the Second Amended Complaint was filed. On June 13, 2016, Defendants Score and Lopez filed a general demurrer to the third cause of action and a motion to strike. The "meet and confer" requirement of CCP § 431.40 has been met. See Declaration of Benton filed on June 13, 2016.

Opposition was filed on July 15, 2016—**three court days** before the hearing. The Court has reviewed the Declaration of Binford regarding the late filing of the opposition. He states that he was hired to type the opposition for the Plaintiff and became ill. See Declaration of Binford. However, there is no reason why the Plaintiff could not have hired someone else. To the extent that Plaintiff concedes the lack of viability of the third cause of action and requests leave to add a cause of action for negligent infliction of emotional distress, the request will be denied for the reasons stated infra. See CRC Rule 3.1300(d).

Merits

Demurrer

The third cause of action is entitled "Intentional Infliction of Emotional Distress." Contrary to the Court's guidance, the cause of action incorporates the allegations set forth in the previous 19 pages. As best can be determined, the Plaintiff alleges that Score and Lopez caused the Plaintiff to suffer severe emotional distress by cleaning up the scene of the altercation which resulted in the loss of evidence. He further alleges that Lopez's statement that the batteries in the security cameras had died was false. See Second Amended Complaint at page 21 ¶ 6.2.

"A cause of action for intentional infliction of emotional distress exists when there is '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation

of the emotional distress by the defendant's outrageous conduct.' A defendant's conduct is 'outrageous' when it is so 'extreme as to exceed all bounds of that usually tolerated in a civilized community.' And the defendant's conduct must be 'intended to inflict injury or engaged in with the realization that injury will result.' " (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050–1051]

To be considered "outrageous", the conduct must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209. "[L]iability 'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. … There is no occasion for the law to intervene … where someone's feelings are hurt.'" (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946, quoting Rest.2d Torts, § 46, com. d, overruled on other grounds in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 579–580.]

"[W]hether conduct is outrageous is 'usually a question of fact' …. [However] many cases have dismissed intentional infliction of emotional distress cases on demurrer, concluding that the facts alleged do not amount to outrageous conduct as a matter of law." (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 235, internal citations omitted.) In the case at bench, the alleged conduct does not rise to the level of outrageousness as a matter of law. Id.

To the extent that the Plaintiff is attempting to allege a cause of action for spoliation of evidence against Score and Lopez, in 1998, the California Supreme Court specifically held that an independent tort of intentional spoliation would *not* be recognized against a party-defendant in the underlying case where the spoliation is or reasonably should have been discovered before the trial or other decision on the merits of the underlying cause of action. *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal. 4th 1. In its ruling, the High Court disapproved *Willard v. Caterpillar, Inc.* (1995) 40 Cal.App.4th 892 and *Smith v. Superior Court* (1984) 151 Cal.App.3d 491. Therefore, the general demurrer to the third cause of action will be sustained.

As for Plaintiff's request to substitute a cause of action for negligent infliction of emotion distress, Plaintiff misunderstands the doctrine. The doctrine of "negligent infliction of emotional distress" is not a **separate tort or cause of action**. It simply allows certain persons to recover damages for emotional distress on a negligence cause of action even though they were **not** otherwise injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928.) Here, Plaintiff has filed separate causes of action for assault and battery and general negligence as a result of the alleged conduct of Fisher in breaking a bottle over his head and the conduct of the security at the Bar in slamming him to the ground. See Second Amended Complaint at pages 20 ¶5.24 and 22 ¶ 7.2. Therefore, a cause of action for NIED would be superfluous. The general demurrer will be sustained without leave to amend.

<u>Motion to Strike Claims for Punitive Damages</u>

A motion to strike punitive damages allegations may lie where the claim sued upon would not support an award of punitive damages *as a matter of law:* e.g., straight promissory note actions; claims against governmental entities, etc. [See Civil

Code § 3294(a); *Commodore Home Systems, Inc. v. Sup.Ct. (Brown)* (1982) 32 Cal.3d 211, 214-215] Additionally, a motion to strike may lie where the facts alleged do not rise to the level of "malice, fraud or oppression" required to support a punitive damages award. [See *Turman v. Turning Point of Central Calif., Inc.* (2010) 191 Cal.App.4th 53, 63—allegations of gender discrimination did not show defendant acted with requisite state of mind for punitive damages]

Defendants Score and Lopez move to strike the claims for punitive damages in the third, fourth and fifth causes of action. They also move to strike allegations in the third cause of action. But, the ruling on the demurrer has rendered the motion to strike moot with regard to the third cause of action.

The remaining causes of action are the fourth cause of action for negligence and the fifth cause of action for premises liability. As for the negligence cause of action (fourth cause of action), ordinary negligence will not support a claim for punitive damages. See *Jackson v. Johnson* (1992) 5 Cal.App.4th 1350, 1354. Here, the allegations show only ordinary negligence. See page 22 ¶ 7.2. As for the premises liability cause of action (fifth cause of action), the facts alleged do not rise to the level of "malice, fraud or oppression" required to support a punitive damages award. [See *Turman v. Turning Point of Central Calif., Inc., supra.*] See page 23 ¶¶ 8.3-8.5. Therefore, the motion to strike will be granted without leave to amend.

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 07/18/16.

(Judge's initials) (Date)

Tentative Rulings for Department 502

(24) **Tentative Ruling**

Re: ***Walker v. Chahal***
Court Case No. 15CECG03227

Hearing Date: **July 19, 2016 (Dept. 502)**

Motion: Motion of Defendants Jasvinder S. Chahal, *dba* Chahal Trucking and Joseph W. Fencil for a Determination of Good Faith Settlement

Tentative Ruling:

To grant the motion of defendants Jasvinder S. Chahal, *dba* Chahal Trucking and Joseph W. Fencil for determination of good faith settlement. (Code Civ. Proc. § 877, *et seq*.) To dismiss all claims against said defendants. (*Id*.)

Explanation:

All parties required to be noticed have been given notice of this motion and no one has filed opposition or objected to the settlement. The settlement between plaintiffs and defendants Jasvinder S. Chahal, *dba* Chahal Trucking and Joseph W. Fencil is found and determined to be in good faith as set forth in Code of Civil Procedure § 877.6. (*Tech-Bilt, Inc. v. Woodward–Clyde & Associates* (1985) 38 Cal.3d 488, 499.) All other joint tortfeasors are hereby barred from any further claims or causes of action against said defendants for any form of indemnity, contribution, or any other pending or future claims or cross-claims related to this action.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 07/15/16.
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***McDonald v. Beck***
Court Case No. 13CECG03807

Hearing Date: **July 19, 2016 (Dept. 502)**

Motion: Defendant Helen Beck's Demurrer to the Third Amended Complaint

Tentative Ruling:

To take the hearing off calendar for failure of moving party to comply with Code of Civil Procedure Section 430.41, subdivision (a), and to grant defendant Helen Beck twenty days within which to comply with said statute; specifically, to meet and confer with plaintiff Marilyn McDonald regarding the issues raised by the demurrer. If the parties cannot agree on the purported deficiencies in the complaint, defendant Helen Beck may calendar another hearing date for the demurrer and must comply with Code of Civil Procedure section 430.41 in doing so. If the parties need more time to meet and confer, they may submit a stipulation pursuant to The Superior Court of Fresno County, Local Rules, rule 2.7.2, showing good cause for more time pursuant to Code of Civil Procedure section 430.41, subdivision (a)(2). If the parties agree that a Fourth Amended Complaint will be filed, they may submit a stipulation pursuant to The Superior Court of Fresno County, Local Rules, rule 2.7.2, permitting such an amendment.

Explanation:

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 07/15/16.
(Judge's initials) (Date)

(17)

Tentative Ruling

Re: ***Limon v. Centex Homes et al.***
Case No. 11 CECG 03487 consol. w/

Centex Real Estate Corp. v. A. L. Drywall et al.
Case No. 13 CECG 02147

Hearing Date: July 19, 2016 (Dept. 502)

Motion: M&L Plumbing Co., Inc.'s Third Motion for Determination of Good Faith Settlement

Tentative Ruling:

To grant.

Explanation:

Under Code of Civil Procedure section 877.6, a settlement entered by one or more of several joint tortfeasors may be determined by the court to be in "good faith." If the court does so, this bars any other joint tortfeasor from any further claims against the settling defendant for equitable comparative contribution, equitable indemnity or comparative fault. (Code Civ. Proc., § 877.)

Tech-Bilt v. Woodward-Clyde & Assoc. (1985) 38 Cal.3d 488, provided the following non-exclusive list of factors for the court to consider in determining the "good faith" of a settlement: "A rough approximation of plaintiff's total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial." (*Id.* at p. 499.) "Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants". (*Ibid*.) "Finally, practical considerations obviously require that the evaluation be made on the basis of information available at the time of settlement." (*Ibid*.)

The moving-party's initial evidentiary burden depends on whether the 'good faith' of the settlement is being contested. If the nonsettling defendants do not oppose the motion on the good faith issue, a 'barebones' motion which sets forth the grounds of good faith, accompanied by a declaration which sets forth a brief background of the case, is sufficient. (*City of Grand Terrace v. Superior Court* (1987) 192 Cal.App.3d 1251, 1261; Rylaarsdam & Edmons, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) § 12:871-12:872.) M&L Plumbing has met its burden and its $5,000 settlement with plaintiffs is determined to have been made in good faith.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 07/15/16.

(Judge's initials) (Date)

Tentative Rulings for Department 503

(19) **Tentative Ruling**

Re: ***Hubbell v. Anderson***
Court Case No. 14CECG03710

Hearing Date: July 19, 2016 (Department 503)

Motion: By defendants for leave to file cross-complaint in interpleader

Tentative Ruling:

To grant.

Explanation:

Two years ago, plaintiff Hubbell filed a lien for $47,694.98 in fees in the underlying case, which is also the same amount she seeks from defendants here. Hubbell withdrew that lien, but without prejudice and when a settlement was entered on the record which required defendants to maintain that amount in their client trust account until it was determined who had the right to that sum. Defendants disclaim any interest in that money, and seek leave to file a cross-complaint in interpleader in this case to have Hubbell and the client in the underlying matter resolve their dispute.

In the case cited by Hubbell, *City of Morgan Hill v. Brown* (1999) 71 Cal. App. 4th 1114, the contract attorney affirmed under oath that she had no claim for fees against the City, her former client. Here, while Hubbell states she did not have a fee agreement with the client, she does state he agreed to her association in as counsel for him, and she does not disclaim an interest in the funds held by Anderson. Pursuant to *Southern California Gas Co. v. Flannery* (2014) 232 Cal. App. 4th 477, where an attorney and a client claimed the right to certain settlement funds, interpleader is proper in this matter.

The opinion in *Southern California Gas Co.* mentions in passing that the trial court found that interpleader was not a "cause of action" under the anti-SLAPP statute, raising the question of the meaning of "cause of action" in the statute at hand, Code of Civil Procedure section 426.30.

"In furtherance of this intent of avoiding a multiplicity of actions, numerous cases have held that the compulsory cross-complaint statute—both section 426.30 and its predecessor statute (former section 439)—must be liberally construed to effectuate its purpose." *Align Technology, Inc. v. Bao Tran* (2009) 179 Cal. App. 4th 949. The Fifth District Court of Appeal held the same about the predecessor statute, Code of Civil Procedure section 439. See *Sylvester v. Soulsburg* (1967) 252 Cal. App. 2d 185, 190.

In keeping with that guidance, construction of the statute to treat interpleader as a qualifying "cause of action" under the compulsory cross-complaint statute

effectuates the statutory purpose of avoiding duplicate cases over the same debt. Thus the motion at issue is deemed one for leave to file a compulsory cross-complaint.

Code of Civil Procedure section 426.50, which governs leave to file such a cross-complaint, states: "This subdivision shall be liberally construed to avoid forfeiture of causes of action." Case law interprets that to call for substantial evidence of bad faith before the exercise of discretion to deny leave will be affirmed. See *Silver Organizations Ltd. v. Frank* (1990) 217 Cal. App. 3d 94, 100:

> "'Bad faith' is defined as '[t]he opposite of 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake ..., but by some interested or sinister motive [,] ... not simply bad judgment or negligence, but rather ... the conscious doing of a wrong because of dishonest purpose or moral obliquity; ... it contemplates a state of mind affirmatively operating with furtive design or ill will."

Hubbell points to the delay in bringing this motion, and asserts that Anderson was aware of the facts surrounding Hubbell's claims against the fund held by Anderson. Hubbell and proposed new party Fletcher were also aware of those same facts. Anderson attributes the delay to problems with prior counsel, and notes some mistakes by that counsel, along with loss of that attorney and the time it took for new counsel to come up to speed. The circumstances do not lend themselves to a finding of bad faith on the part of moving parties, and the Court grants leave to file the complaint in interpleader.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 7/14/16 .
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Hubbell v. Anderson***
Court Case No. 14CECG03710

Hearing Date: July 19, 2016 (Department 503)

Motion: By defendants to continue trial

Tentative Ruling:

To deny.

Explanation:

No moving papers were filed.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 7/14/16.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***DeMera v. Viatronix Incorporated***
Superior Court Case No.: 14CECG02602

Hearing Date: July 19, 2016 (**Dept. 503**)

Motion: Demurrer to first amended complaint by Defendant Viatronix Incorporated

Tentative Ruling:

To overrule as to the first and third causes of action, and to sustain as to the second cause of action, without leave to amend, with Defendant granted 10 days' leave to answer. The time in which the complaint can be answered will run from service by the clerk of the minute order.

Explanation:

The first and third causes of action state facts sufficient to constitute a cause of action for fraud and deceit—promise made without intent to perform, and financial elder abuse, and are not barred by the statute of limitations. (Code Civ. Proc., § 430.10, subd. (e); Judicial Council of Cal. Civ. Jury Instns. (Dec. 2013) CACI No. 1902; Judicial Council of Cal. Civ. Jury Instns. (June 2014 rev.) CACI No. 3100.) The issues concerning standing were already dealt with in this Court's ruling on the prior demurrer on November 19, 2015.

The new allegations in the first amended complaint at ¶23a-d, are sufficient facts from which a trier of fact could hold that Defendant Viatronix Incorporated ("Defendant") had a contemporaneous intention not to perform the promise. (*Locke v. Warner Bros., Inc.* (1997) 57 Cal.App.4th 354, 368.) The new allegations at ¶25a-f are enough to allege delayed discovery or an estoppel concerning the statute of limitations. (Code Civ. Proc., § 338, subd. (d); *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 27.)

The second cause of action for intentional misrepresentation, however, continues to fail to allege a representation about a past or existing fact was made. (*Henry v. Continental Building & Loan Assoc.* (1909) 156 Cal. 667, 680; *Zeh v. Alameda Community Hotel* (1932) 122 Cal.App. 366, 368; *Borba v. Thomas* (1977) 70 Cal.App.3d 144, 152; *Neu-Visions Sports v. Soren/McAdam/Bartells* (2000) 86 Cal.App.4th 303, 307.) Consequently, the cause of action fails to state facts sufficient to constitute a cause of action, and the demurrer to it is sustained, without leave to amend. (Code Civ. Proc., § 430.10, subd. (e).)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order

adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 7/14/16 .
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Champion Home Builders, Inc. v. CFG Capital, Inc., et al.***

Case No. 15CECG03330

Hearing Date: July 19, 2016 (Dept. 503)

Motion: By proposed Defendant David Justice, Trustee for the James A. Justice Living Trust for leave to intervene.

Tentative Ruling:

To deny the motion without prejudice.

The Court will set an Order to Show Cause re: Reclassification of this Case as a Limited Civil Case for August 24, 2016, at 3:30 p.m. in Department 503. Any opposition to the OSC must be submitted to the Court no later than August 10, 2016. Any reply brief to the opposition must be submitted no later than August 17th, 2016.

Explanation:

Compulsory Intervention

In order to intervene as a matter of right pursuant to CCP §387, subdivision (b) a nonparty must show it claims an interest in the property or transaction involved in such litigation, and is so situated that any judgment rendered in his absence "may as a practical matter impair or impede that person's ability to protect that interest." There is no right to intervene where the nonparty's interests are adequately represented. (CCP §387, subd. (b).)

Proposed Defendant has pointed to no case law supporting its right to intervene, nor has it pointed to any cause of action which would vindicate its right to intervene. *(Mylan Laboratories, Inc. v. Soon-Shiong* (1999) 76 Cal.App.4th 71, 78-79 (lack of cognizable interest defeats compulsory joinder); *Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 ("Where a point is merely asserted by appellant's counsel without any argument of or authority for the proposition, it is deemed to be without foundation and requires no discussion by the reviewing court.") The proposed Complaint-in-Intervention itself contains no specific causes of action. At best, it seeks an accounting, but premises that on no special relationship between any of the parties or on the presence of complicated accounts. (*Fleet v. Bank of America, N.A.* (2014) 229 Cal.App.4th 1403, 1413.) The Court should also note that the motion is based on both the proposed Complaint-in-Intervention and the exhibits attached to the proposed pleading. The copy in the Court's files is unsigned. (Code Civ.Proc. §128.7, subd. (b).) Otherwise, there is no evidentiary basis for any reliance on the exhibits as evidence.

Therefore, based on the arguments presented by Proposed Defendant, it is not entitled to compulsory intervention.

Permissive Intervention

With respect to permissive intervention, CCP section 387 is to be construed liberally in favor of intervention. (*Simpson Redwood Co. v. State of Calif.* (1987) 196 Cal.App.3d 1192, 1201.)

It may be allowed where (1) the nonparty has a direct and immediate interest in the litigation; (2) the intervention will not enlarge the issues; and (3) the reasons for the intervention outweigh any opposition by the existing parties. (*Truck Ins. Exch. v. Super Ct.* (1997) 60 Cal.App.4th 342, 346.)

However, in order to show entitlement to permissive intervention, the party must still show that they have a direct and immediate interest in the outcome of the litigation; i.e. they must stand to gain or lose by direct operation of the judgment. (*Fireman's Fund Ins. Co. v. Gerlach* (1976) 56 Cal.App.3d 299, 303-305.) As stated above, proposed defendant has pointed to no cause of action and has presented no legal authority supporting its claim to the moneys at issue in this case. Therefore, the Proposed Defendant has presented no "direct and immediate interest" in the outcome of the case. For this reason, the motion is denied without prejudice to the Proposed Defendant seeking to intervene on a more developed record.

Reclassification

The Court notes that the amount at issue in this case is $18,000.00. It appears, therefore, that this case should be reclassified as a limited civil case. (Code Civ.Proc. §86, subd. (a)(2) (limited civil cases include "an action of interpleader where the amount of money or the value of the property involved does not exceed twenty-five thousand dollars.").) Therefore, the Court is inclined to set an Order to Show Cause re: reclassification of the case as a limited civil case pursuant to Code of Civil Procedure §403.040.

The Court will schedule an Order to Show Cause re: Reclassification of this case a Limited Civil Case for August 24, 2016, at 3:30 p.m. in Department 503. Any opposition to the OSC must be submitted to the Court no later than August 10, 2016. Any reply brief to the opposition must be submitted no later than August 17th, 2016. If no opposition is received, the Court will order the case reclassified and transferred to an appropriate Limited Civil Department.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 7/18/16 .
(Judge's initials) (Date)